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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO._____

ALICE LOUISE MILLER, ET AL.,
PETITIONER

VS.

TIM CURRY, DISTRICT ATTORNEY,
TARRANT COUNTY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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I

QUESTIONS PRESENTED FOR REVIEW

1. Does Imbler v. Pachtman, 424 U. S. 409 (1976) immunize a District Attorney from damage actions under 42 U.S.C. §1983 to permit the prosecutor to decline to prosecute, as a matter of policy, family violence cases based solely on gender and marital status?

2. Is a District Attorney absolutely immune from damage actions under 42 U.S.C. §1983 when his willful and voluntary decision not to act deprived the Petitioners of rights and privileges protected and insured by the Constitution and Laws of the United States, to wit: deprivation of life without due process, denial of equal protection of the law and the right of access to courts for redress of grievances?

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RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

ALICE LOUISE MILLER, ET AL., the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Texas, entered on the above entitled case on February 17, 1982.

OPINIONS BELOW

The 17th Judicial District Court of Tarrant County, Texas, granted Defendants Motion to Dismiss on March 20, 1981.

The Second Supreme Judicial District Court of Civil Appeals upheld the judgment of the 17th Judicial District on November 25, 1981, and Petitioners' Motion for Rehearing was denied on December 16, 1981. (See Appendix).

The Supreme Court of Texas denied Petitioners' Application for Writ of Error, stating that there was no reversible error, on February 17, 1982. Said decision is a final ruling by the highest Court of the State of Texas.

JURISDICTION

The Judgment of the Supreme Court of Texas (Appendix) was entered on February 17, 1982. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257, Subsection 3, and Supreme Court Rule 19.4.

STATUTE INVOLVED

42 U.S.C. §1983 (1979).

STATEMENT OF THE CASE

Two young women, one black and one white, were brutally and senselessly murdered in Fort Worth, Texas. They never knew each other, yet they shared certain common characteristics in their respective fates; both were killed by men with whom they shared a marital relationship, both were slain in brutal fashion in front of their children, both were killed with handguns, and both had been turned away by the District Attorney after begging for action to be taken against the men who were to kill them.

The linchpin allegation in this case is precisely this: the Tarrant County District

Attorney had a policy and practice of refusing to accept complaints from women who were or had been in a marital or quasi-marital relationship with the men who were brutalizing and terrorizing them.

As set forth in Exhibit "A" to the Plaintiff's Amended Petition (Appendix), the District Attorney deemed such cases to be "doggy", serving no purpose but to clutter up the judicial system.

Cut off from the protection of the criminal justice system, these doggy cases were left to fend for themselves. How did they fare?

Mary Wynell Miller went in person to the Office of the District Attorney seeking to file a complaint against her husband. She had been threatened by him at her home, in public, and, on one occasion, at her place of employment in the presence of three witnesses. But she was just another doggy case to the one public official who could have exercised the police power to protect her. She was just another woman who had made a bad choice and was now crying for help from public office holders with more important things to do. No complaint would be filed, no inquiry would be made for Mary Wynell Miller. Dogs do not warrant such treatment.

On December 6, 1978, Mary Wynell Miller was confronted by her husband as she prepared to get out of her car with her children. As she stepped from the car, she was shot to death in the driveway.

Between December 21, 1979, and January 14, 1980, a period of some twenty-four days, Geral Murrell lived in Hell. During this reign of terror, her automobile was demolished by vandalism, windows in her mother's home were smashed, and she was repeatedly threatened with death. The architect of this scheme and it's sole perpetrator was her ex-husband. Finally, she received a death threat in the mail. Frantic, she went to the District Attorney. No inquiry was to be made, no charge was to be filed. No room for doggy cases she was told.

On January 14, 1980, as she sat in her friend's car preparing to go to her job, Geral Murrell was approached by her ex-husband. She had her 21-month-old baby in her lap. Mr. Murrell pulled her head through the passenger side window and began beating her with the pistol he was carrying. Wearying of this, he held her head fast against the roof and literally shot her brains out. The infant was still in her lap.

In its present posture, the allegations of the Petitioners below must be taken as true, under the Texas Rules of Civil Procedure. Under the present ruling of the Courts below, a prosecutor could selectively refuse to prosecute a rape case in which the victim was black, or a crime in which the victim was Baptist, or, as here, crimes in which the victims were women who had been in marital or quasi-marital relationships with the men who killed them. It is ironic that only after their deaths were they of note to the system designed to protect them. Apparently, the crime to which the prosecution excepts is murder - abuse is allowed. But, does this system allow such abuse by a prosecutor?

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, I.E., WHETHER A PROSECUTOR'S DECISION NOT TO PROSECUTE FAMILY VIOLENCE CASES IS A CONSTITUTIONALLY PERMISSIBLE EXERCISE OF DISCRETION WHEN THAT DECISION IS BASED ON THE GENDER AND MARITAL STATUS OF THE VICTIM.

The Court below erred by adopting an all embracing interpretation of absolute pro-

secutorial immunity that conflicts with decisions of Federal Appellate Courts and the decision of this Court in Imbler v. Pachtman, 424 U.S. 409 (1976). The construction in the Court below insulates District Attorneys from damage actions under 42 U.S.C. §1983 when they purposely and willfully make out-of-court prosecutorial decisions based on constitutionally impermissible criteria.

The deaths of the Petitioners' decedents deprived them and their decedents of rights and privileges secured by the Constitution and Laws of the United States. In Imbler v. Pachtman, supra, this Court decided State Prosecutors have absolute immunity under 42 U.S.C. §1983 in regard to conduct during criminal trials. The Court left open the issue of what immunity, if any, existed in the non-judicial role of the prosecutor.

The Fifth Circuit in Marrero v. The City of Hialeah, 625 F.2d 499 (5th Cir. 1980), Cert. denied 67 U.S. 377, 101 S.Ct. 1353 (1981) gave prosecutors only "qualified immunity" from §1983 actions for money damages when they are performing functions outside of their courtroom role of prosecuting a case. It is important to note that in Marrero, supra, the defendant had

the benefit of a defense attorney, an impartial court, and others to review the actions of the District Attorney. In the instant case, the decision of the District Attorney was totally unreviewable.

Shortly after the Fifth Circuit of Appeals had decided the Marrero case, the Third Circuit Court of Appeals rendered its opinion in Mancini v. Lester, 630 F.2d 990 (3rd Cir. 1980). In that per curiam opinion, the Court followed the rationale set forth in Marrero. Mancini was a civil rights action, brought under 42 U.S.C. §1983, and in its reading and interpretation of Imbler, the Mancini Court ruled that the quality of the prosecutorial act involved in any given case would establish the kind of prosecutorial immunity that would be granted in that situation.

Other Federal Courts have applied a functional analysis to the immunity question and have granted prosecutors only qualified immunity, and only when there has been a finding that they acted in "good faith". Taylor v. Kavanagh, 640 F.2d 450 (2d Cir. 1981); Lee v. Willins, 716 F.2d 320 (2d Cir. 1980); Mancini v. Lester, supra; Hampton v. Hanrahan, 600 F.2d 600, 631-32 (7th Cir. 1979), rev'd in part on other grounds, per curiam, 446 U.S. 754 (1980);

D'Iorio v. County of Delaware, 447 F.Supp. 229 (E.D. Pa. 1978); Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977); Helstoski v. Goldstein, 552 F.2d 564 (3rd Cir. 1977); Tomko v. Lees, 416 F.Supp. 1137 (W.D. Pa. 1976); Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974); McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972); McCray v. Burrell, 622 F.2d 705 (4th Cir. 1980); Dodd v. Spokane County, 393 F.2d 330 (9th Cir. 1968); Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965).

As noted, Imbler v. Pachtman, supra, held that state prosecutors were absolutely immune from money damage suits under 42 U.S.C. §1983 in connection with the presentation of the State's case in criminal matters. The factual context of Imbler is significant. That case involved an allegation that the District Attorney had knowingly or negligently used false testimony to secure a murder conviction. The focus of the Court's opinion was the need to protect the District Attorney from damage actions of the sort that would undermine his performance in "deciding which suits to bring and in conducting them in court". Imbler, supra, at 424. The concern of the Imbler Court was directed at the possibility of criminal

defendants suing the District Attorney following an unsuccessful prosecution. The Court noted that such lawsuits would necessarily involve relitigation of the criminal trial. It was the Court's concern that the District Attorney, in his decision to prosecute specific individuals and in his decisions concerning what evidence to use at such trials remain free of concern with civil lawsuits.

Imbler was concerned with the spectre of individual criminal defendants seeking to relitigate their trials and impose liability upon prosecutors acting in their judicial role. If it had been a class of plaintiffs, would the Court have reached the same decision? Yet, even this distinction is not of particular moment, for the reason that Petitioners' decedents in the instant case are not those who have been criminally prosecuted or who have complaints to make of prosecutors acting in judicial roles. Rather, Petitioners' decedents are two among a class or group of women who are denied access to the criminal justice system and are harmed by this denial.

In Imbler the Court left open the issue of what immunity, if any, should be granted to prosecuting attorneys acting in their investigative and administrative capacities. As the Court noted, "drawing a proper line

between these functions may present difficult questions". Imbler, at 40, 424 U.S. 409, 430, f.n. 33. The Court re-emphasized that its decision applied only to the initiation and presentation of cases in court and noted that some actions by the District Attorney were preliminary to the initiation of prosecutions and were outside the courtroom. It was these preliminary actions outside the courtroom that posed "difficult questions". But note that throughout Imbler, the Court's reasoning speaks only to plaintiffs who have been prosecuted.

The instant case is thus distinguished from Imbler in several critical respects:

1. Petitioners are not disgruntled former defendants in criminal cases. The concern in Imbler in this regard is well worth noting again. If a prosecutor, using his best judgment under the stress of trial is also at risk in civil terms, the purpose of prosecution might well be blunted. The prosecutor must be free to prosecute those whom a Grand Jury indicts or those misdeamants named in informations. The notion of anything less than vigorous prosecution offends us all. Such is not the case at hand. In this case there is no chilling of the prosecutorial function. Further, holding for Petitioners in the case at bar

would not open the floodgates to relitigation of criminal cases by criminal defendants.

2. Petitioners are not challenging the District Attorney's method of prosecution, which was the focus of Imbler, but rather his systematic refusal to extend the protection of law to women who, on the basis of their marital status, were denied access to the criminal justice system. It is this discrimination that gives rise to the most striking difference between the instant case and the reported cases involving prosecutorial immunity. It is not an individual, but a class or group of women who are discriminated against on the basis of their sex and marital status.

3. Petitioners are not challenging the District Attorney's decision about prosecution on the basis of facts in individual cases; rather, they are attacking the District Attorney's practice and policy of refusing to exercise discretion in particular cases which results in an across-the-board policy or practice of not investigating or prosecuting on the basis of gender and marital status. As the Court pointed out in Oyler v. Boles, 368 U.S. 448, addressing the issue of selective prosecution of recidivists, although "the

conscientious exercise of some selectivity in enforcement is not in itself a federal constitutional violation", it might well be a violation of equal protection if "the selection was deliberately based upon a justifiable standard such as race, religion, or arbitrary classification". Oyler, supra. at 456. The instant case clearly involves a policy or practice deliberately based on such an unjustifiable standard, i.e., gender and marital status. If Petitioners' decedents in the instant case were all black, and only blacks were denied access, would the case seem more outrageous? If the basis of the discriminatory policy or practice alleged by Petitioners were religious rather then sex-related, would we be more offended?

4. Petitioners are not challenging decisions relating to the prosecution of cases in the courtroom, that is, decisions subject to judicial supervision. As Justice White noted in his concurring opinion in Imbler, the granting of absolute immunity for constitutional violations committed in the courtroom is justifiable because such violations occur during an integral part of the judicial process and they are detectable and correctable by opposing

counsel and by trial and appellate judges. That reasoning does not obtain in the case at hand. Constitutional violations committed outside the courtroom are not subject to review save and except through cases like this one. Constitutional violations committed outside the courtroom can otherwise be buried.

II. PETITIONERS' DECEDENTS HAD THE CONSTITUTIONALLY PROTECTED RIGHT NOT TO BE DEPRIVED OF LIFE ITSELF BY THE STATE WITHOUT DUE PROCESS OF LAW. AND, THEY HAD THE CONSTITUTIONALLY PROTECTED RIGHT, PURSUANT TO THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, NOT TO BE DISCRIMINATED AGAINST BY THE STATE BECAUSE OF THEIR MARITAL STATUS AND SEX.

The decedent women involved in this case had protected rights under the Fourteenth Amendment to the Constitution of the United States. It was their right that the state not deprive them of life without due process of law. It was their right under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States not to be invidiously discriminated

against by the state because of their sex, see, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 78 (1971); and marital status, see, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972). The decedent women had a constitutionally protected right that the state treat them in a rational and equal manner with respect to the enforcement of criminal law. See, Yick Wo v. Hopkins, 118 U.S. 356 (1886). They had a right that sounds in the Constitution of the United States, specifically in the First Amendment, that the state not bar access to the courts for redress of grievances. Those rights were denied the decedent women and resulted in their deaths.

The Petitioners alleged below that the Defendant District Attorneys intentionally and systematically, as a matter of policy and practice, refused to investigate or prosecute any husbands who inflicted injury on their wives or ex-wives. Specially, Petitioners alleged that each of the decedent women had approached the Office of the District Attorney of Tarrant County, Texas, seeking to file charges and enjoy the protection of law. That assistance and that right to the protection of law was denied them. The Petitioners have alleged

below the violation of rights secured by the Constitution and Laws of the United States, and 42 U.S.C. §1983, and those violations, for purposes of this appeal, must be taken as true. Wheeler v. White, 398 S.W.2d 93 (Tex. 1965); Dierlam v. Clear Lake Hospital, 593 S.W.2d 774 (Tex. Civ. App. - Houston [14th Dist.] 1979, no writ.).

The fact that a prosecutor has discretion to prosecute or not to prosecute individuals does not mean that a prosecutor has the power tc exercise that discretion by denying access to the courts to a class or group of persons, when that class or group discrimination is unrelated to valid prosecutorial concerns.

The case of Swain v. Alabama, 380 U.S. 202 (1965), involved peremptory challenges of jurors by the District Attorney, allegedly on the basis of race. In that case, the Court intimated that if the defendant could prove that blacks were systematically excluded from serving on any juries so as to deny blacks the same rights as whites, then a due process violation might well be found. The importance of that case is that it speaks to the limits of prosecutorial immunity. It speaks to the fundamental rights secured by 42 U.S.C. §1983 under the

Fourteenth Amendment. The clear intimation is that where discrimination based on unjustifiable standards is in question, immunity will not obtain and constitutional rights will be recognized.

Linda R. S. v. Richard D., 410 U.S. 614 (1973) was a case in which the Court held that the mother of an illegitimate child could not bring an injunctive action against the State District Attorney in Federal Court to prohibit him from declining criminal prosecution of putative fathers who fail to support their illegitimate children. In that case the state courts had construed the relevant criminal statute as not applying to fathers of illegitimate children. The Supreme Court held that the plaintiff had not made a sufficient showing of a nexus between her interest of child support and the enforcement of criminal law. However, it is important to note that the Court believed there was no nexus because enforcement of the criminal laws would merely put the putative father in jail and thus prosecution would not necessarily result in support payments. In the instant case, prosecution of the husband and ex-husband, and their resulting incarceration would have prevented the loss of life of Petitioners' decedents. Further, the

Supreme Court's denial of injunctive relief in Linda R. S. was clearly related to issues of federalism. The plaintiff was asking a federal court to enjoin a state official and, in effect, overturn a state court's interpretation of state law. Moreover, the plaintiff in Linda R. S. had other viable remedies to protect her interests. She could have sued the putative father for damages or asked the State Court for a declaratory judgment on the applicability of the criminal law to putative fathers. No such viable remedy existed for Petitioners' decedents in the instant case other than self-help.

Linda R. S. must also be read in conjunction with Martinez v. California, 100 S.Ct. 553 (1980). The United States Supreme Court in Martinez held that a suit for damages under 42 U.S.C. §1983 against a parole board, based on its release of a prisoner who killed a 15-year-old girl five months after release, did not allege deprivation of life within the meaning of the Fourteenth Amendment. In making this decision, however, the Court stressed that "the parole board was not aware that appellant's decedent, distinguished from the public at large, faced any special danger". The Court was thus making clear that had the

parole board had direct knowledge that the victim was a special target, it might well have had a duty to prevent harm from coming to her. In the instant case, Petitioners allege that the Defendant District Attorneys knew full well that the victims were special targets and needed protection from specific aggressors - their husband and ex-husband. It is important to note that the parole board makes the same kind of discretionary decisions as a District Attorney. Indeed, decisions of a parole board may be even more delicate and difficult to make than those of a District Attorney. Yet the Martinez Court left open the issue whether a parole board's decision to release a prisoner could result in the deprivation of a right secured by the Constitution.

In the instant case there is no basis for the Tarrant County District Attorneys' assertion that Petitioners' decedents had no constitutionally protected rights which were violated by the District Attorneys who, like the parole board, are state officials. From the right of equal protection to the right to life itself, these women were protected by the United States Constitution and the Laws of the United States.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Texas was served upon Frederick M. Schattman, Attorney for Tim Curry, at 200 West Belknap, Fort Worth, Texas 76102, and Cue Lipscomb, Attorney for Louis Barnett, 900 River Plaza Office Tower, 1701 River Run Road, Fort Worth, Texas 76107, by United States Mail, Certified, Return Receipt Requested, postage prepaid, on this 14th day of May, 1982.

PATRICK EMMETT CLARKE